Career Systems Development Corporation *and* Pennsylvania Social Services Union Local 668 of the Service Employees International Union, AFL–CIO, Petitioner. Case 4–RC–17087

January 30, 1991

DECISION ON REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On January 5, 1990, the National Labor Relations Board, by a three-member panel, granted the Employer's request for review of the Regional Director's Decision and Direction of Election with regard to the Board's assertion of jurisdiction over the Employer.

Having reviewed the entire record, as well as the briefs on review, we agree with the Regional Director that the Employer[1] possesses sufficient discretion over wages and terms and conditions of employment to engage in the give and take of collective bargaining. In so finding, we rely particularly on evidence demonstrating that, under the contract administered by the Pennsylvania Department of Public Welfare (DPW), the Employer retains control over noneconomic labor relations matters and substantial discretion over the allocation of employee wages and fringe benefits, as illustrated by the instances of state approval of increased funds for salaries and fringes without requiring information as to the distribution of the additional funds.

Our dissenting colleague concedes that the Employer ''has discretion over wage ranges and initial salaries,'' but contends that this case is controlled by *Res-Care, Inc*.[2] because the Employer had to seek prior DPW approval for shifts of funds from other areas into the general salary category (which, according to the testimony of the Employer's vice president, also included the costs of fringe benefits). The record shows, however, and our colleague does not contend otherwise, that within that general category, the Employer is free to allocate the money among the various employees and managers as it sees fit.[3] In our view, therefore, the DPW's control over general expenditure categories does not amount to a ''final, practical say over wages and benefits'' equivalent to that which prompted the Board to decline jurisdiction in *Res-Care*. There, as the Board found, initial wage ranges, including the maximum for each, and the substantive terms of many employee benefits required approval from the exempt entity, and changes in any of those levels also required approval.[4] The difference between the degrees of control is critical. Of course, we concede that the Employer here does not operate totally free of all constraints on its wage and benefit decisions, but we do not find that fact sufficient to require a finding that there is no basis for meaningful bargaining. As Judge Posner observed regarding the exempt entity's control over wages and benefits in *NLRB v. Kemmerer Village*, 907 F.2d 661, 664 (7th Cir. 1990):

> The nature of [the state] funding scheme gives the Department [of Children and Family Services] substantial control over Kemmerer's wages and benefits, but not so much control as to render collective bargaining over employee compensation (the focus of the Board's doctrine) futile. Kemmerer does not have a free hand in setting employee compensation, true; but who does? In a competitive market, competition limits the wages that firms are willing to pay. In a regulated market, the regulatory agency tries to simulate the effect of competition, and limits wages through its power to disallow imprudent or unreasonable expenditures.

Here the DPW has done nothing more than maintain some general oversight that will help ensure, among other things, that salaries do not consume a disproportionate amount of the state-funded budget.[5]

Accordingly, we affirm the Regional Director's decision asserting jurisdiction in this case.

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I would decline to assert jurisdiction over the Employer. In *Res-Care, Inc*., 280

[1] Although the Employer here has the same name as the employer in Case 10–RC–13906 (301 NLRB 436) and is probably the same corporation, the exempt entities and the contractual relationships in the two cases are different. In this case the Employer is operating an educational and treatment center for incarcerated and adjudicated juvenile delinquents under contract with the Pennsylvania Department of Public Welfare. The employer in Case 10–RC–13906 operates a job corps center in Tennessee under contract with the U.S. Department of Labor (DOL). We note that *Res-Care, Inc*., 280 NLRB 670 (1986), also involved a job corps center operated under contract with DOL.

Chairman Stephens dissented in *Res-Care*, but he applies that as Board precedent here and agrees for the reasons stated in this opinion that it is distinguishable from this case.

[2] 280 NLRB 670 (1986).

[3] We find no merit in the Employer's contention that the Regional Director failed to consider that it, like the employer in *Res-Care*, supra, was required by the request for proposal to submit detailed budgetary line itemizations of wages and fringes, which then became incorporated in the final contract. The Employer's exhibits disclose no such itemization. (The Employer refused to proffer the subpoenaed document, claiming that it contained proprietary and confidential information.) Like the Regional Director, we are unable to make findings in the absence of evidence. In any event, given the evidence regarding the Employer's discretion to make changes in the allocation of moneys within the salary/benefit category, our decision to assert jurisdiction would not be affected by the Employer's substantiation of its claim concerning the line item submission.

[4] Id. at 674.

[5] Contrary to our dissenting colleague, we similarly see no basis in the evidence concerning control over working conditions other than wages and benefits for concluding that the Employer lacked significant discretion in these areas. Our colleague concedes that the Employer has control over decision with respect to firing, discipline, attendance policy, grievances, promotions, demotions, performance appraisals, and merit reviews. He relies, however, on evidence that the DPW can determine staffing levels, employee qualifications, job titles, and the like for his conclusion that the Employer lacked sufficient authority over bargainable subjects to make meaningful bargaining possible. Because standards concerning such matters commonly apply to most government-regulated private facilities with public health responsibilities (e.g., medical certification requirements for hospitals and nursing homes), we disagree with his reliance on this evidence.

NLRB 670, 674 (1986), the Board stated that ''if an employer does not have the final say on the entire package of employee compensation, i.e., wages and fringe benefits, meaningful bargaining is not possible [footnote omitted].'' In my view, the contract between the Employer and the Pennsylvania Department of Public Welfare (DPW) substantially restricts the Employer's discretion with respect to the economic terms and conditions of employment and thus precludes the Employer from engaging in meaningful collective bargaining.

The record indicates that the Employer submitted in its proposed budget a total annual allocation for salaries, which also included sick leave, vacation, and holidays.[1] At the request of DPW, the Employer agreed to reduce its proposed management fee and reallocate the difference to salaries. A total amount for fringe benefits was also specified, with designated portions to be used for workers' compensation, social security, health and life insurance, pension, short-term disability, and tuition refunds. Changes in fringe benefit policies may not affect the budgeted amounts without DPW's approval. Moreover, although the Employer may shift funds between line items or cost categories, any reallocation involving salaries requires prior approval by DPW. Such approval has been sought and granted on two occasions. In the first instance, the Employer requested to reallocate funds from outside psychological services to salaries in order to have certain services performed by a staff member at the facility. On the second occasion, the Employer sought the required approval for a general salary increase, proposing to use its own funds in order to remain within the contract price. In view of this approval requirement, it is clear that, even though the Employer had discretion over wage ranges and initial salaries, it does not retain the final say over the critical areas of salaries and fringe benefits. Under these circumstances, I find that the Employer lacks the discretion necessary for meaningful collective bargaining.

Furthermore, I am not persuaded that the Employer's discretion over noneconomic labor relations matters warrants the assertion of the Board's jurisdiction. As the Regional Director found, the Employer has independent authority to make decisions with respect to firing, discipline, promotions, and demotions. It also establishes its own policies on such matters as attendance, grievances, performance appraisals, and merit reviews. On the other hand, although the Employer decides whom to hire, minimum staffing levels and employee qualifications are determined by DPW. The record also indicates that DPW required the Employer to make certain changes in its organizational chart, including changes in job titles, duties, and hierarchy. Moreover, the contract provides that the Employer must make a good-faith effort to fill 25 percent of its vacancies with applicants referred by local public assistance agencies.

Because of the substantial limitations on the Employer's discretion in determining terms and conditions of employment, particularly with respect to salaries and fringe benefits, I conclude that it would not effectuate the purposes and policies of the Act to assert jurisdiction over the Employer. Accordingly, I would reverse the Regional Director's Decision and Direction of Election and dismiss the petition.[2]

[1] As the majority notes, the Employer asserts that it submitted more detailed budgetary information, as required by the Request for Proposal. However, the Employer did not produce this information. My conclusion in this case would not be affected by the level of detail presented in the Employer's submission.

[2] See *Career Systems Development Corp.*, 301 NLRB 436 (1991).